APPENDIX A.

Decided May 19, 1943

Argued April 16, 1943

U. S. PLAINTIFF APPELLEE
vs
GEORGE A. TURLEY ETC.

Appeal from a judgment of the District Court for the District of New York by George A. Turley and Peter W. Burns. They were convicted under #18 U. S. C. A. 415 and under 18 U. S. C. A. 88 after trial by jury affirmed, before Augustus N. Hand, Chase and Clark Circuit Judges.

Chase Circuit Judge

George A. Turley and four others were indicted for transporting or causing to be transported in interstate commerce securities theretofore stolen and of a value in excess of $5,000 in violation of 18 U. S. C. A. 415. The indictment also contained a count charging conspiracy to violate the above statute contrary to 18 U. S. C. A. 18.

A severance was granted to one defendant; two others pleaded guilty and a fourth was convicted with Turley and Burns but only these two have appealed.

It was discovered sometime in April of 1937 that twenty-five gold notes attached to proofs of claim in the reorganization proceeding of the Minnesota and Ontario Paper Company had been stolen from the files of the U. S. District Court at Minneapolis, Minn. At the time of the stealing,

appellant Burns was in the business of obtaining and selling lists of stockholders and was specially interested in lists showing the names of stockholders of companies in the process of reorganization.

He operated his business under the name of Bond and Share List Company, 15 William St. New York City. Turley, an attorney practising in New York City, was also interested in obtaining such lists and there was evidence showing that he and Burns had been acquainted since as early as 1935.

Burns and another defendant Bollenbach were shown to have been at the United States District Court House in Minneapolis in the latter part of January 1937 and it was proved that Bollenbach had been examining the files where the gold notes which were stolen were kept. Burns likewise admitted that he had telephoned Turley in New York while he was enroute either to or from Minneapolis; and although he testified that the purpose of his call to Turley was to obtain the address of another Turley in Chicago who dealt in stockholders lists the jury did not have to believe that, but might well have inferred that the conversation was about these gold notes.

Sometime early in February of 1937 Bollenbach returned to New York City rented an office at 15 E. 40th. Street under the alias of Berendson and tried to dispose of ten of the gold notes which had been stolen in Minneapolis. There was evidence that placed Burns in this office at least ten times in the short period, Bollenbach used it. Bollenbach's attempt to sell ten of the notes proved unsuccessful when Hart Smith & Co., through whom he tried to make the sale grew suspicious and stopped payment on its check

which had been made out and delivered to Berendson for the bonds and on which there appeared only a typewritten endorsement in that name when Berendson tried to open a checking account by depositing the check in a bank. Thereafter Bollenbach made efforts through another defendant; Jacobson, to effect either the return of the notes or the cashing of the check but he was unsuccessful.

While these negotiations were going on, Bollenbach through Turley disposed of the remaining fifteen notes. This was accomplished with the aid of the defendants Blaser and Ingalls who were called to Turley's office and to whom Hurley introduced Bollenbach as "Mr. Brown." At Turley's suggestion a fictitious sale was put through Blaser and Ingalls as though in the regular course of business and made to a "Walter T. Roberts." after which they disposed of the notes through A. E. Ames & Co. on the strength of a letter, brought to them by Bollenbach, which purported to give them authority to make the sale. Blaser then cashed the check of Ames & Co. which was made out to "Roberts" after guaranteeing the endorsement in that name. Ingalls testified that he took the money to Turley's office where some sort of division was made.

Turley, Burns and Bollenbach were all present. Later in April 1937 Turley told Blaser and Ingalls that Burns had stolen the bonds in Minneapolis according to testimony which was admitted against Turley.

There was likewise evidence that Turley and some of the other defendants had been involved in similar transactions for the disposition of securities which had either been stolen or obtained by fraud.

The appellants claim that error was committed in that there was not enough evidence to support the verdict. In that the court committed error in charging the jury and in that the court acts alleged and proved left the crime charged still unproved as the statute requires because they occurred after the notes had come to rest in the State of New York and after they had lost their interstate character.

We think for the reasons about to be given, that there was enough evidence for the jury to have found as it did that these appellants either transported or caused to be transported, in interstate commerce, securities which were known to have been stolen; and we are also satisfied that the jury was justified in finding that they conspired to do so.

Burns and Bollenbach were both in Minneapolis in January of 1937 and Burns admitted he had been in the Court House from which the notes were stolen. Bollenbach was not only seen there, but also had access to the files wherein the notes were kept. That the jury was justified in concluding that they were to steal the notes if they could and take them to New York is adequately clear. Their continued association after Bollenbach returned to New York and was trying to dispose of the securities tied them well enough together in this business. Burns was not only seen at the office maintained by Bollenbach under the name of Berendson, but he was also seen by Ingalls to have taken some of the proceeds of the sale made through Blaser and Ingalls. This evidence not only supported an inference that Burns conspired to transport the stolen bonds or cause them to be transported from Minneapolis to New York, but it also justified the conclusion that he participated as a principal in the substantive crime charged. Furthermore, his co-

operation in the disposal of the notes tended to show that he acted with a guilty knowledge of the whole transaction from start to finish. U. S. V. Seeman, 115F (2) 371. There was also proof that Burns was in touch with Turley by telephone which well might have been treated as highly indicative of their then participation in the common venture even though Burns explained that his call had another and an innocent purpose. Indeed the jury might well have inferred that they were participating in the substantive crime charged as well as the conspiracy. Bearing on this is the corroborative evidence that Turley dealt with the stolen notes after they had reached New York. That he had before been engaged in similar transactions with some of the conspirators; one of which involved the stealing of securities by Bollenbach from the U. S. District Court at Wilmington, Delaware to be sold in New York, and that he had told Blaser and Ingalls that the notes had been stolen by Burns (U. S. v. Seeman) The evidence consequently was substantial in support of the verdict as to both Burns and Turley.

The appellants objected to the charge of the Court to the effect that they might be convicted under 18 U. S. C. A. 415 if they were organized to dispose of stolen securities; were willing so to do, and cared not where the property came from, either within or without the State. An exception was taken to this charge although no reason for the exception was given. The theory of such a conviction as stated in the charge is "that by furnishing a market for such stolen property he (such person) thereby caused bonds in another State to be transported to New York." Under the circumstances that was a fair statement of the rule set forth in United States v. Crimmins, 123 F. (2) 271, 273. There it was pointed out that an agreement to take and dispose of

stolen securities, whether or not some of them came from without the State would support a conviction for conspiracy to transport stolen securities in Interstate Commerce in violation of 415, Title U. S. C. A. Relevant to the existence of such an agreement was the evidence of Turley's similar transactions, such as the one in Delaware, that Turley and Burns were in touch with one another by telephone; and that Turley and Burns participated with Bollenbach in the disposal of the notes in New York. The court in substance charged this when it said "A continued indifference to the source of the bonds, coupled with the knowledge that they had come beyond a State, would be some evidence of such an agreement." It was not an error to follow the Crimmins case this way.

The appellants also insist that it was erroneous to charge the jury as follows:

"It is not necessary at all for Turley or Jacobson to be out in Minneapolis at all. In saying what I am about to say, please do not feel that I am expressing any view held by myself, but I am trying to illustrate to you. Let us say for example Turley agreed to finance Bollenbach and Burns in going out to steal these bonds in Minneapolis, knowing that they were there in the Clerks Office. He would be as guilty then if they brought back the bonds to Turley in New York as if Turley was out in Minneapolis, because they would be acting for him in his work.

"It is not for me to say, and I don't mean to indicate, as I said a moment ago, that that was a fact; but you are entitled to take all these circumstances into account in coming to a conclusion whether this is a planned theft or transportation of these bonds."

When one of the attorneys objected to this illustration the Court again disclaimed any intent to charge that Turley had in fact, financed the trip and said, "I don't say he did". The appellants, however argue that this was error in that the Court charged the jury on facts that did not exist; and it was error of course, if the court went so far as to usurp the functions of the jury. (Quercia v. U. S., 289 U. S. 466). Nor could the Court make deductions or advance theories which were not warranted by evidence. (U. S. v. Brietting, 20 HOW 252.) But here the Court was not doing that but merely indicating by way of illustration that Turley might be guilty of the substantive crime of causing the transportation of stolen securities in interstate commerce even though he remained in New York. That was, of course, a fair statement of the law. Furthermore, it is a stretch to say that the use of this illustration in connection with a proposition of law was such an unfair comment as to warrant a reversal on the theory that the use of it brought about the conviction of the appellants. (See Allis v. U. S., 155 U. S. 117, 123; Luteran v. U. S., 93 F. (2) 395, 401.

In view of the sufficiency of the evidence to support the verdict as above indicated both as to transportation and conspiracy, it is immaterial when, if ever, the notes ceased to be in, interstate commerce before the conspirators disposed of them.

Affirmed.

APPENDIX B.

UNITED STATES OF AMERICA
vs.
GEORGE A. TURLEY, *et al.*

December 4, 1941.

Mr. Hawthorne: On behalf of the defendant Bollenbach, as your Honor knows, an application for an adjournment was made last Monday for an adjournment of one month. Mr. Bollenbach stated that he had retained Mr. Fennelly. Mr. Fennelly called me yesterday afternoon and said he would be unable to appear and try this case for Mr. Bollenbach unless it was adjourned for one month.

The Court: The case was set for today and we will proceed to impanel a jury and take the opening statements and then adjourn the taking of testimony until Monday morning at 10:30.

Mr. Bollenbach: Your Honor I have no attorney representing me to defend me this morning.

The Court: Well, you should have one.

Mr. Bollenbach: I engaged Mr. Fennelly and he cannot be here and I have no attorney.

Mr. Reis: Mr. Hawthorne has never told me that he has withdrawn, and Mr. Fennelly told me last night that he is not in the case. Mr. Hawthorne has heretofore been retained and paid, and so far as I know he is in the case, at least he knows the case, and I ask that your Honor assign him to this case for this morning.

The Court: Yes, I will assign Mr. Hawthorne to represent Mr. Bollenbach.

Mr. Simpson: I would ask your Honor if there is to be a trial today that I be granted a severance for Mr. Burns.

The Court: You have appeared for Mr. Burns?

Mr. Simpson: Yes, sir.

The Court: The testimony will not start until Monday.

Mr. Bollenbach: May I make a motion on the ground that I engaged counsel and that my counsel cannot be here, and I am without counsel? There is going to be murder charged in this case, and I don't see why I should not be represented by an attorney.

The Court: You have had plenty of opportunity, and the Court has appointed Mr. Hawthorne.

Mr. Bollenbach: This is the first time that I have asked for a postponement of the case. The case has been coming on since last January, and every time it was postponed because the government asked for it.

The Court: I cannot adjourn the case now.

Mr. Bollenbach: May I take up an exception? And am I to go on trial without an attorney?

The Court: I have assigned Mr. Hawthorne to represent you.

Mr. Bollenbach: I do not want Mr. Hawthorne and do not think he is competent to handle the case, and under the circumstances I am going to trial without an attorney.

The Court: Most certainly you are not at all.

Mr. Bollenbach: I beg your Honor's pardon.

Mr. Sager: I would like to move to compel the district attorney to elect between the two counts of the indictment on the ground that the evidence which may be adducible on one count might be of no effect on the other, and I make the same motion as to the second and third counts.

The Court: The motion is denied.

Mr. Hawthorne: In view of Mr. Bollenbach's statement I would move that I be allowed to withdraw from the case.

The Court: Your motion is denied.

Mr. Hawthorne: Exception.

The Court: Call a jury.

(A jury was duly impaneled and sworn.)

* * * * *

The Court: Do you desire to say anything to the jury, Mr. Bollenbach?

Mr. Bollenbach: I am representing myself, sir.

The Court: Do you have anything you wish to say?

Mr. Bollenbach: I will prove that I was on a trial in Philadelphia in the Circuit Court of Appeals, by competent attorneys from the State of New Jersey, and never as Mr. Milenky and Mr. Keating and Mr. Reis is trying to put me, in Minneapolis. I have never been in Minneapolis. I don't know what it looks like, and I will produce three of the largest law firms who were trying a case of reorganization for me, and I will make monkeys out of Mr. Reis and his cohorts who now are practicing fraud on this Court, and deceit, and crime, and conduct prejudicial to my getting a fair trial right here. Furthermore, I might say, your Honor, that the Federal Criminal Code takes into consideration securities over $5,000. The actual value of these securities—I might give Mr. Reis a good steer here and he might look at list 29, which says that the original value of these securities put out by the Minnesota and Ontario people were a fraud on the stockholders, and the value wasn't 75 million, but was $25,500,000. The Government says that when the corporation originally issued those securities they defrauded the bondholders. Taking that into consideration the true and marketable value was less than $5,000. Now Mr. Reis can find that in Schedule 29 in the reorganization. So taking that into consideration the true and marketable value was less than five thousand. Now there is not a deviation between whether the market value should be taken into consideration or the face value of the bonds that were originally issued—they were fraudulent. You must not lose sight of the fact, was the value

of the bonds twenty-five thousand or was the value less than five thousand. I say to you folks of the jury if they were less than five thousand they are licked on their own evidence.

Now who are these people who are going to testify against the defendants? Every one of them has admitted their guilt in other cases. I will produce to you character witnesses of standing like such as Frank Ferguson of the Port Authority, and Mr. Keating and Mr. Milenky can interview them and browbeat them if they have the nerve to and want to. I understand that Mr. Milenky has charged—

Mr. Reis: Now—

Mr. Bollenbach: Wait a minute.

The Court: Proceed.

Mr. Bollenbach: I am going to prove that Mr. Milenky took a young lady and browbeat her and told her, said to her that he would prove that she and some other witnesses had had sexual intercourse together; that Mr. Burns was keeping company with another young lady, and this young lady was accused that Mr. Burns was bruiting all over the street that he had been banging her. That is the kind of evidence that you may have introduced here into court; and I will tell you that just because the Government is presenting this case to you don't think that the defendants haven't some rights.

Furthermore, the reason I couldn't get an adjournment this morning is quite laughable—Judge Knox doesn't know this, but I will tell him now, that he has been taken advantage of here this morning; he doesn't know it. By whom? Mr. Reis, Mr. Milenky, Mr. Keating. And why? They sprung on him, "Your Honor, we can't give this adjournment because the Government has been to such great expenses." Now I will tell you what to do with them—talk

about Hitler? Hitler is a gentleman compared to some of the crap these brutes are playing off here.

The Court: Mr. Bollenbach, you will have to use decent language in this court.

Mr. Bollenbach: They used to parade us up and down like a bunch of sheep, and then they would bring a clerk of the court from Minneapolis to identify us as defendants. They did that not once, they used to parade us up and down. We didn't have to stand up, because we knew the racket that was going on. Mr. Reis would say, "Are the defendants in there?", and we would have to parade up and down like sheep being led to slaughter. Those are the kind of tactics you are going to see here in this case from Mr. Reis. They want to convict us.

Are you married? Are you folks on the jury married? Just think of one fact—since I have been apprehended in this court I have had a little girl born to me, and she is now 17 months old, and that is the reason I am fighting here. They at no time can implicate or complicate me in Minneapolis. And I say to them right now, let's reverse this trial once. Let's do just a little different. I will put my case on and if they can find me in Minneapolis, I will take the rap. I will put my character witnesses and all my witnesses on first and I will show every day where I was in the month of January and in February, and I will make them look like monkeys. They don't dare do it, because they are going to try to build this case up with innuendo. They haven't a case, and they are trying to make a case.

The Crimmins case that has just been decided, in that case they say—

The Court: You are going outside of the evidence that you intend to present here.

Mr. Bollenbach: The Crimmins case says—

The Court: We don't care about that at this time.

Mr. Bollenbach: There has just been a case handed down by the Circuit Court of Appeals—

The Court: Just confine yourself to this case.

Mr. Bollenbach: All right. The law says then—

The Court: No, no. It make no difference now what the law says. I will determine the law in this case. You are trying to evade what I am telling you.

Mr. Bollenbach: I don't want to fence. I would very much dislike to file an affidavit of prejudice against your Honor.

The Court: Go ahead and file one if you want to.

Mr. Bollenbach: You are not permitting me the right of hiring a lawyer, which I think I am entitled to.

The Court: You have counsel to advise you.

Mr. Bollenbach: I have no counsel. I will show you a check payable to Leo C. Fennelly—

The Court: We do not care about that at this time.

Mr. Bollenbach: —that is sufficiently large enough to hire counsel for me, and you are refusing me that right.

The Court: Mr. Hawthorne, when were you retained in this case?

Mr. Hawthorne: A year and a half ago.

The Court: Were you paid a fee?

Mr. Hawthorne: Part of my fee.

The Court: And you have consulted with the defendant from time to time?

Mr. Hawthorne: A number of times, yes, sir.

The Court: When was Mr. Fennelly first consulted in the case?

Mr. Hawthorne: In May of this year.

The Court: He first appeared in court last week.

Mr. Hawthorne: As far as I know that is true.

Mr. Bollenbach: Mr. Fennelly has been engaged in May

of 1941. This case was moved for trial so often that I commenced to get grey hair.

The Court: Proceed.

Mr. Bollenbach: As I was detailing to you before, Mr. Reis beyond a reasonable doubt has got to prove that I had definite knowledge and participated in the stolen bonds in Minneapolis according to the decision that was handed down by the Circuit Court of Appeals on December 3rd. According to that decision there can be no ifs or ands. He has to prove my being in Minneapolis. I defy him to do that, and I defy him to put me on the stand and let me account for every day. I will make a monkey out of him and he knows it.

And I want to make a motion right now that my case be severed from the rest of these defendants now, or that this matter be postponed until Mr. Fennelly has an opportunity to finish his anti-trust case which would be to the middle of January.

The Court: Your motion is denied.

Mr. Bollenbach: I take an exception.

* * * * *

(After the jury retired the following took place):

Mr. Ziegler: In the absence of the jury and on behalf of the defendant Turley I would like to move for a severance, and I think the performance that is still fresh in the Court's mind will cause the Court to agree with me almost beyond a doubt, that there can be no fair trial to any defendant in this case unless he stands trial alone and not encumbered with any statements which may or may not be biased or prejudicial, but which certainly add nothing to the proper conduct of a lawsuit.

Mr. Sager: I join in that motion.

Mr. Ziegler: I would like to suggest that the defendant Bollenbach having asked for a severance, if the Court

doesn't want to order four separate trials, then I will join with Bollenbach in asking that his severance be granted.

Mr. Reis: I don't see why the Government should be penalized in this case. This man has had counsel right along, and I think the Court is quite capable of keeping him within the bounds of propriety.

Mr. Sager: You cannot dissipate the foul atmosphere that has already been created.

Mr. Simpson: I have no comment. I asked for a severance and your Honor refused it, and I am here to go to trial. I do not think that we are helped at all by what has occurred, but we have to be tried and that is all there is to it.

The Court: I think the exhibition this morning was quite uncalled for, and I will consider whether or not I will grant a severance. And I will consider also the question of contempt.

Mr. Bollenbach: I do not want to offend you or this Court, your Honor.

The Court: You offended the jury.

Mr. Bollenbach: Well, your Honor, I was a little excited. May I apologize for any remarks that I made this morning that may have been offensive?

The Court: I will consider the matter of whether I will grant a severance.

Mr. Bollenbach: Your Honor must remember I have a little girl I am fighting for.

The Court: That is all right to fight for your little girl. If you come into this Court you will get a fair trial.

Mr. Bollenbach: All I ask is that I be represented by competent counsel.

The Court: You have had a year and a half. The only time Mr. Fennelly appeared was last week when he asked for a month's adjournment and the Court cannot allow its

calendar to be disrupted by counsel called in at the last minute.

Mr. Bollenbach: Mr. Fennelly would have gone on with my case if he could have gotten away from the antitrust case he is engaged in.

And again I want to say to the Court that I am sorry if I said anything to the jury to offend it.

The Court: I warn you now that one more exhibition such as you gave this morning will cause you to be committed to jail for contempt, and you will stay there for quite a while.

Mr. Reis: The Government has been put to a great deal of expense in preparation, and all the witnesses are here in this trial, and we are prepared to go ahead, and if there is a severance it may make it very difficult for the Government to proceed as it has contemplated.

Mr. Ziegler: I wouldn't care if the Government wasted ten million dollars if the result of that was the conviction of one innocent man.

Mr. Hawthorne: I again ask your Honor to withdraw me from the case.

The Court: I will direct you to continue in the case as long as it is before the Court.

UNITED STATES OF AMERICA,
vs.
GEORGE A. TURLEY, *et al.*

New York, December 8, 1941;
10:30 a. m.

Trial resumed.

The Court: Let the defendants come up inside of the rail.

(The defendants complied.)

The Court: I should think perhaps with respect to the motions that were made on Thursday for the severance of this indictment, that the best thing to do is to discharge this jury and take a new jury rather than to sever the defendants.

I want to say in that connection to Mr. Bollenbach that his action on Thursday was, in my judgment, contemptuous and justifies his punishment for that contempt by incarceration. I have no desire to do that providing he behaves himself throughout the rest of this trial. He has now put the Government to a great deal of expense and the Court to annoyance, and has jeopardized the interests of the other defendants, and it must be upon the distinct understanding that the Court will no more tolerate any of the gutter language, Mr. Bollenbach, such as you used here the other day, because if you do repeat what happened the other day, you are going to jail as certainly as you are sitting there now.

Bring in the jury.

Mr. Bollenbach: Your Honor, is it time for motions or not?

The Court: Yes; you can make motions.

Mr. Bollenbach: Are you bringing the jury in now or discharging them?

The Court: Yes.

Mr. Bollenbach: I will make a motion then after the jury is discharged.

The Court: Make your motion then now. What is your motion?

Mr. Bollenbach: My motion is that I wish to present to you as an exhibit a photostatic copy of a check. I will show you that check, sir. You will mark this as an Exhibit No. 1 as presented by Chester G. Bollenbach and reading Leo C. Fennelly, Attorney. That was given to Mr. Fennelly on December 1st to represent me on this trial.

The Court: Did he keep the check?

Mr. Bollenbach: He kept the check and he gave me this check back on Wednesday afternoon after we found out that Mr. Reis would not grant an adjournment, and that he was engaged in an anti-trust suit defending the Hamilton Ice Company. I present his envelope, Leo C. Fennelly, addressed to Chester G. Bollenbach.

The Court: Very well. You have had an attorney for upwards of a year and you come in at the last moment with Mr. Fennelly, and ask that the case be adjourned. The witnesses were collected from various parts of the country for the purpose of going ahead with the trial. You have had plenty of time and you have counsel you obtained over a year ago and with whom you consulted, and there is no reason why you should have an adjournment to bring in an attorney.

Mr. Bollenbach: Mr. Reis, as early as May in 1941, Mr. Reis of the United States District Attorney's office knew and was advised, and he called up Mr. Hawthorne, to Mr. Hawthorne's surprise, that Mr. Fennelly was brought into the trial and was to represent me, and as a result on Tuesday, if I am not mistaken, Mr. Reis told Mr. Fennelly that this case was going to trial, so now the Government cannot raise the question of true facts and it cannot plead surprise; that I was attempting to delay the trial and these indictments, or hinder the prosecution of justice.

The Court: The defendant should have been prepared to go to trial when this case was called for trial. You have had a great deal of experience with attorneys and you could have had an attorney represent you long before the day Mr. Fennelly came into court. Do you want Mr. Hawthorne's representation?

Mr. Bollenbach: No, sir; I do not, sir. May I have Mr. Reis then now read to you, sir, the indictment, and I will

point out to you that this entire thing is concocted by fraud on Mr. Reis's part.

The Court: No.

Mr. Bollenbach: All right. Then I will read the first count of the second indictment.

The Court: No. You won't. The indictment is on file.

Mr. Bollenbach: All right; but just a minute. In his charge to the jury, your Honor, if you had studied the indictment you would have found out that Mr. Reis was lying to you deliberately, deliberately lying to you, and he is going to prove facts that are absolutely immaterial as far as I am concerned.

The Court: The Court will rule on whether or not the facts are material or otherwise. The case proceeds.

Mr. Bollenbach: Again, your Honor, I am making my plea that I am being represented in this trial without the attorney of my choosing.

The Court: It is your own fault that he is not here.

Mr. Reis: May I state for the record that this is the third attorney; that Mr. Samuel Hirschenstein represented this defendant when he was first arrested and filed a notice of appearance, and Mr. Hawthorne then appeared for him, and Mr. Fennelly did not file an appearance unless he knew he could try the case, and Mr. Fennelly stated he would be in it if he could get a proper adjournment to make motions in the anti-trust case. Mr. Hawthorne never filed as counsel representing this defendant, so that for the purpose of the record this defendant did not inform your Honor of that status. Of the three counsel he is talking about, there were two in this case.

Mr. Simpson: I would like to renew my motion that I made for a severance on behalf of Peter Burns, your Honor now having discharged the jury.

The Court: I have not as yet.

Mr. Simpson: As a result of what happened, which I need not repeat, my client cannot safely go to trial with Mr. Bollenbach. He will be prejudiced. I want it to appear that we do not sit silent while your Honor discharges the jury.

The Court: I have not discharged the jury yet.

Mr. Simpson: I had understood that your Honor had discharged this jury.

The Court: No.

Mr. Simpson: I was badly informed. I did not want it to appear we sat idly by while that was done without objecting. But that is my motion; for the severance. I know that the cases say that it is a matter for the discretion of the trial court and no exception will be allowed unless that discretion is passed. I do not of course put myself in the position of saying your Honor is abusing any discretion but I do say it seems to me palpable, without any elaborate argument, that we are entitled to a severance. Mr. Zoline in his textbook cites a case approved by the United States Supreme Court which says that the matter is not cured by the trial judge telling the jury to disregard it, because their minds were poisoned by what occurred. I say that this jury's mind must have been poisoned when Mr. Bollenbach, whom I am not criticizing at all, he is a man on trial for a crime, when he states in the presence of the jury matters about my client and about a woman and about the District Attorney having attempted to get illegal evidence against my client, which I tried to cure as best I could with the jury, and I wish to state that I was making no attack on the District Attorney, and I shall, without unduly arguing the matter with your Honor, now ask your Honor for a severance as far as Peter Burns is concerned; that is, from Bollenbach; that is, either Bollenbach is not to be tried with us or we are not to be tried with Bollenbach or, in the alter-

native, for a mistrial as far as Peter Burns is concerned, because of what occurred after the jury was duly impaneled and sworn.

Mr. Reis: Do I understand that Senator Simpson is making the motion for the mistrial in the alternative?

Mr. Simpson: In the alternative; that is as to Peter Burns. If your Honor denies my severance, I must protect myself in some way, in my opinion, from trial with Mr. Bollenbach before this jury. Of course, I do not move for a mistrial if your Honor directs that we be severed and have a separate trial. Then of course I do not move for a mistrial.

The Court: Is there anyone else?

Mr. Sager: I would like to join in that motion, if your Honor please.

Mr. Hawthorne: I would like to move, in view of the statement of the defendant Bollenbach, as well as the statement made in court this morning, that I be relieved of the assignment to represent him in this trial. Since we were in court last week I tried to arrange an appointment with him. He has refused to cooperate, and for me to try to represent him in the trial after the last three or four weeks, where evidence will be adduced that I was unable to meet before this time, I think that it is unfair to ask me to represent him and to do a decent job.

The Court: The thing that concerns me is whether or not the defendants other than Bollenbach can safely proceed to trial with him in the case, because I think it is quite likely that he will do or say something that may prejudice the other defendants.

Mr. Reis: I would like to join in the motion of Senator Simpson for a mistrial. He said in the alternative. And with your Honor's admonition, I think that Mr. Bollenbach will be kept in check. Your Honor has warned him, and in

this case here it would not only work a hardship on the Government to sever, but there will be certain material proof necessary which will be proven by the Government which will prejudice the Government's case materially if the defendant Bollenbach will not stand trial.

I wish to call your Honor's attention to another fact: That after Bollenbach made the showing he did on Thursday, and everybody had left the courtroom, he asked Mr. Keating of the FBI, "Did I put on a good act?" So they are seeking a severance here and it is not done in good faith as far as the defendant Bollenbach is concerned, and he is putting on an act with a certain objective in mind, if your Honor please, and I think the defendant's representatives are well protected if a mistrial is granted and a new jury impaneled and the defendant Bollenbach warned as you have already warned him.

Mr. Bollenbach: May I answer Mr. Reis? I do not intend to go on trial without a counsel of my own choosing. I would rather go to jail fighting for democracy. That is what we are fighting for; democracy; and I say to you I respectfully request you to have my attorney in court here; the attorney of my choosing.

The Court: Why didn't you choose him and have him in court long before?

Mr. Bollenbach: Unfortunately, the man is definitely tied up in an anti-trust suit.

The Court: Yes; and every case in the court would have to be put off for him, and would never come to trial.

Mr. Bollenbach: But I tell you I am going to fight, and I will go to jail fighting. I am fighting for democracy. I am fighting with my attorney. The attorney of my choice shall represent me and I do not intend to have the Department of Justice slip a sly one across, as I will prove in Mr. Reis's opening, charging that this was loaded

with fraud and decide that he is trying to make a monkey out of everybody in court here.

Mr. Sager: I thought this over overnight, your Honor, and decided that we will lose a lot of time and have a lot of heartaches if we go on with Mr. Bollenbach in this trial. I do not know what the man's mental condition is. I do not think he is putting on an act. I do not think he is responsible for what he is saying.

The Court: I would like to see counsel in chambers.

(The Court and Counsel conferred in Chambers.)

(The following occurred in the courtroom not in the presence of the jury):

The Court: In view of what has taken place with respect to Mr. Bollenbach's conduct, I think it desirable from the standpoint of the other defendants that their motions, that there be a severance of this indictment, so that they will not be required to go to trial, and that motion should be granted, and I will grant the motion.

In my judgment, Mr. Bollenbach's conduct has been so contemptuous, so disrespectful and so prejudicial, that he has been guilty of contempt of court, and I so adjudge him and I sentence him to be confined to the Federal Detention Headquarters for a period of three months. The execution of that sentence is in the hands of the Marshal.

Mr. Bollenbach: I should like to have that judgment arrested until I have had a chance to seek a writ.

The Court: You communicate with the Marshal.

Mr. Bollenbach: All right; will you set bail now?

The Court: No bail.

Mr. Bollenbach: May I have an hour's time in which to consult an attorney without being incarcerated?

The Court: No; you are in the custody of the Marshal.

Mr. Bollenbach: Will your Marshal stay with me? I am in his care. I have a right to consult with an attorney and arrange bail.

The Court: There will be no bail. You will have to apply to somebody else to admit you to bail. He is in custody of the Marshal. Take him down to the Marshal. Then let him call up his attorney.

Mr. Hawthorne: Now that we have rectified one of the series of circumstances—

The Court: I will grant your motion, Mr. Hawthorne, to be relieved.

Mr. Hawthorne: I move for the discharge of the jury and the impaneling of a new jury.

The Court: I don't think I will do that. The case is severed. We can safely proceed with this jury.

(The jury entered the courtroom at 11:15 a. m.)

The Court: Ladies and gentlemen of the jury, I am sorry you have been detained this morning, but there were certain matters that had to be attended to, and I thought it necessary that what did transpire should be outside of the presence of the jury.

You recall, I have no doubt, a statement made to you on Thursday by Mr. Bollenbach and the violence of his statement. Thereafter the attorneys for the other defendants felt they might be prejudiced, that their clients might be prejudiced if the trial proceeded. As you know, Mr. Bollenbach's conduct was wild, and no one could tell what he might say throughout the course of the trial that would be prejudicial to the other defendants.

After thinking the situation over the week-end, I have come to the conclusion that he was in contempt of court for misconduct and disrespect, and that conclusion was strengthened this morning by his conduct in the courtroom. So I have finally decided to sever his case from the cases of the other defendants and I have sentenced him to imprisonment for contempt of court. He is now in the custody of the Marshal.

I could also discharge you and take a new jury with respect to the other defendants, and I want to give them an entirely fair trial, and I would not want any one of you to be prejudiced and to draw any inferences against any of the defendants that are going to trial, at least upon anything Mr. Bollenbach said on Thursday. I don't want you to indulge in any prejudices of bias or draw any unfair inference to the defendants.

In what I have done to punish him for his misconduct and disrespect, I will ask each of the jury if he or she feels in the cases of the defendants who remain in this case that they would be prejudiced by anything that has occurred in connection with the case.

(Each juror answered in the negative.)

The Court: Let the record show that each juror has said that he or she would not in any way be prejudiced by anything that has happened to or said by Bollenbach, and with that assurance, I will deny the discharge of the jury and proceed with the trial.

Mr. Ziegler: I will except to the Court's ruling about discharging the jury.

CHELL M. SMITH, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct Examination by Mr. Reis:

* * * * *

Q. You were here in May of this year, pursuant to subpoena? A. I was.

Q. Did you identify a person that you had seen in Minneapolis in January or early in February of 1937, in this building? A. To my best judgment and recollection; yes, sir.

Q. Do you know who this man is (indicating a person who had been brought into the room)? A. I don't know his name.

Q. Did you ever see that man? A. To my best judgment and recollection, yes, sir.

Q. Did the man have glasses on when you saw him (indicating person brought into the room—Bollenbach)?

Mr. Bollenbach: I respectfully state I have just been jeopardized by this particular case. I have been committed for contempt of court for three months. I am downstairs engaging counsel, so I respectfully ask don't jeopardize my interest. I respectfully ask—

The Attendant: Be quiet.

Mr. Bollenbach: I will not be quiet. This is an educated democracy (yelling at top of his voice).

The Court: Be quiet.

Mr. Bollenbach: I will not be quiet.

The Court: Again the Judge will adjudge you in contempt of court and sentence you to three more months.